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UNITED STATES OF AMERICA

NATIONAL LABOR RELATIONS BOARD

WASHINGTON, DC

COMPREHENSIVE CARE OF OAKLAND LP, BAY AREA HEALTHCARE, Employer, and CAYETANO SANCHEZ, Petitioner, and SEIU, UNITED HEALTHCARE WORKERS-WEST, Union.	No. 32-RD-134177 **EXCEPTIONS AND BRIEF IN SUPPORT OF EXCEPTIONS TO HEARING OFFICER'S REPORT ON OBJECTIONS**

SEIU United Healthcare Workers – West (hereinafter "Union" or "UHW") hereby takes the following Exceptions to the Hearing Officer, Noah Garber's, Report on Objections , attached hereto as Exhibit "A":

EXCEPTION NO. 1 (P. 7) - THE HEARING OFFICER MISCONSTRUED AND IGNORED APPLICABLE BOARD LAW:

The Union takes exception to the Hearing Officer's application of the law governing promises of tangible economic benefits to the facts presented at the hearing. The Hearing Officer cited *Crown Electrical Contracting, Inc.* 338 NLRB 336 (2002); *Weather Shield Mfg.,* 292 NLRB 1 (1988); and *El Cid, Inc.,* 222 NLRB 1315 (1976);[1] asserting that these decisions support the proposition that statements by employers merely "advising" that "their current wages and benefits will stay the same regardless of the election results" is not objectionable conduct. (Report, p.7) The Hearing Officer's interpretation of the rule announced in these decisions is overbroad and misapplied in the instant case. In each of the decisions the Hearing Officer cited, the employer statements were merely responses to employee questions and not explicitly part of the employer's campaign against the Union. This consideration was made clear in *Crown Electrical Contracting*, the most recent of the decisions cited in the Hearing Officer's Report. In reviewing the employer's promise to maintain the status quo in that case, the Board stated:

> [T]he Employer's statement was not made as part of a campaign speech or otherwise initiated by the Employer. Instead, the statement was simply made in response to a question from an employee, who was a witness for the Petitioner. Moreover, the Employer did not elaborate on the statement, and the employees did not ask him any followup questions. It is highly improbable that the Employer saw this employee's question as an opportunity to influence the election.

Crown Electrical Contracting, Inc., 338 NLRB 336, 337 (2002).

While some of the Board's language might suggest to the casual reader that the rule announced in these decisions is as broad as the Hearing Officer asserts, a careful read reveals clearly that the decisions are rooted in the fact that the employers' pledges about future terms and

[1] The Hearing Officer also cited *Ernst Home Centers, Inc.,* 308 NLRB 848 (1992). However that decision seems to have been cited in error as it makes no reference to the proposition discussed in the Hearing Officer's recommendation and fails to support the findings.

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conditions of employment were merely responses to employee questions or confusion, and lacked evidence of coercion.

The Board has held otherwise where promises to maintain the status quo are clearly part of the employer's campaign against the Union. In *Pacific Telephone Co.*, 256 NLRB 449 (1981), where employer statements were explicitly made within a campaign speech against the Union, the Board held that statements that employees would continue to receive the benefits of the union contract even without the union, violated the Act because they "constituted a promise of benefit made for the purpose of coercing employees into rejecting a union." The Board also described that the employer's statement unlawfully suggested that union representation would be futile. *Id.* at 449. Likewise, in *I.C. Refrigeration Service, Inc.*, 200 NLRB 687 (1972), the Board affirmed an ALJ finding that the employer unlawfully promised benefits to an employee when it pledged to "try to come up with a medical plan, something comparable to what the Union could offer," if an employee agreed to leave the union. *Id.* at 695.

In the present case, Shirley Ma's statements were clearly made in the context of a campaign speech and attempt to urge employees to leave the Union. By all accounts, at the February 16 meeting, management repeatedly urged employees to give Ma a "chance" by voting out the union. (*See e.g.*, Hearing Transcript (Tr.) 60:19-22 (Ma's testimony that in the captive audience meeting she described what a non-union facility would be like under her direction and urged employees to give her a "chance"); Tr. 130:22-24. It was within this context that Ma made the statements regarding future benefits of employees. As the statements were incorporated into Ma's extended campaign presentation, involving multiple managers, and an earlier meeting with a slide show regarding union dues, it is obvious that the statements were not merely "advising" employees in response to employee initiated questions, but were part of her campaign to get rid of the Union. Accordingly the statements are properly reviewed under *Pacific Telephone,* rather than *Crown Electrical Contracting.*

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EXCEPTION NO. 2 (P. 8) – THE HEARING OFFICER IMPROPERLY DISCREDITED MARY SHELBY'S TESTIMONY BECAUSE SHE WAS NERVOUS:

The Union takes exception to the Hearing Officer's decision to discredit Mary Shelby's testimony because she seemed "extraordinarily nervous." Given the context of this hearing, Ms. Shelby's nervousness is an improper reason to discredit her testimony. As the Hearing Officer pointed out, while giving her testimony regarding Owner and Facility Administrator Shirley Ma's unlawful statements, Shelby was sitting a mere 10 feet away from Ma, who was present in the hearing room. (Report, p.8) As an African-American employee, Shelby had even more reason to fear Ma, because Shelby was aware that Ma had a reputation in the workplace for disproportionately terminating African-American employees. Shelby had been present at the February 16 meeting when a CNA coworker confronted Ma about the fact that Ma terminated fourteen (14) African-Americans immediately after taking over management of the facility. Tr. 154:1-7. Ma raised the same issue in front of Shelby during the hearing, stating:

> I started out trying to refute the false rumors that I heard regarding I was going to cut benefits and pay. And I would terminate all the African Americans. And I tried to refute those false rumors. And then I spoke about my experiences -- before I did that, I make a point to say I cannot make any promises because I knew I cannot make any promises. I do not want people to get the idea that I was making promises when I try to refute those false rumors.

Tr. 60:8-16.

Moreover, because of the fact that Ma's own sworn testimony lacked truthfulness, Shelby had even more reason to believe Ma was capable of unlawfully discriminating against her for testifying. The Hearing Officer himself acknowledged that Ma's testimony was not credible, as she was "combative" and appeared "coached." (Report, p.8) Given Ma's history of terminating African Americans, her capacity for breaking the law and concealing the truth, Shelby's nervousness was completely rational, and should not be used against her.

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EXCEPTION NO. 3 (P. 8) – THE HEARING OFFICER IMPROPERLY CONSTRUED AS CONTRADICTORY MARY SHELBY'S TESTIMONY THAT MA BOTH PROMISED NOT TO CUT WAGES AND PROMISED TO RAISE THEM:

The Union takes exception to the Hearing Officer's decision to discredit Shelby's testimony based on the unsupported opinion that it did not "make sense" for Ma to both promise not to cut wages, and promise employees a wage increase in the same meeting. (Report, p.8) Both Shelby and Ma testified that Ma promised not to cut employee pay and benefits. There is no dispute in the record in that regard. Ma characterized this by describing that she was merely trying to "refute" rumors that she would cut pay and benefits. Tr. 60:7-22. Ma never denied telling employees that wages and benefits would not be cut. Shelby testified that Ma also stated later in the meeting that she would be giving employees a raise in March 2015. Tr. 44:1-2. Ma denied saying anything about a raise, but it came out in the testimony that she did give a raise to at least one person in March, 2015, for employees who were below the Oakland Minimum Wage. Tr. 115:14-17. The fact that raises were actually given in March, just as Shelby recalled that Ma announced at the meeting, corroborates Shelby's testimony that the wage increase was indeed announced.

Further, the Union excepts to the Hearing Officer's decision to attribute any alleged inconsistency between two statements made by Ma, to Shelby, who is merely the messenger relaying what she heard. Though the two statements Ma made are not actually inconsistent, as they were both (inappropriate) attempts to promise benefits, even if the statements had been inconsistent as the Hearing Officer claimed, it would be inappropriate to attribute *the employer's inconsistency* to the credibility of the witness, without evidence that the witness was not being truthful. As there was no such evidence, the Union excepts to the Hearing Officer's unsupported inconsistency opinion about Shelby's testimony.

EXCEPTION NO. 4 (P. 8) – THE HEARING OFFICER FAILED TO ACKNOWLEDGE EMPLOYER ADMISSIONS ON THE WITNESS STAND:

The Union excepts to the Hearing Officer's failure to recognize the significance of the employer's admissions on the witness stand. Shirley Ma repeatedly testified that, at the February

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16 meeting, she refuted "rumors" that she was planning to cut employee pay and benefits. *See e.g.*, Tr. 60; 65; 124. Yet the Hearing Officer credited the testimony of Akanbi and Sanchez, who both claimed that the topic of benefits and pay *never came up at all.* Tr. 139:20-25; 144:17-145:3. By disregarding the employer's own testimony that cuts to pay and benefits were in fact discussed at the February 16, 2015 meeting, the Hearing Officer failed to acknowledge a critical employer admission during the hearing. If it were true, as the Hearing Officer found, that Shirley Ma never said anything about benefits at all during the meeting, Ma would lack incentive to testify that she was merely dispelling rumors. Ma's undeniable admission that the topic of pay and benefits were in fact discussed is completely inconsistent with the Hearing Officer's findings in favor of the employer. Therefore the Union excepts to this clearly erroneous finding that, contrary to the employer's admissions, the subject of pay and benefits never came up at the February 16 meeting.

EXCEPTION NO. 5 (P. 8) – THE HEARING OFFICER ERRONEOUSLY FOUND THAT AKANBI AND SANCHEZ CORROBORATED MA'S TESTIMONY:

The Union excepts to the Hearing Officer's erroneous finding that witnesses Sanchez and Akanbi corroborated Ma's testimony. As discussed above, Shirley Ma testified emphatically that at the February 16 meeting she discussed rumors that wages and benefits would be cut, and rumors that she would fire African American employees if the Union was voted out. Tr. 60; 65; 124. On the other hand, the employer's witness Funmi Akanbi and Petitioner Cayetano Sanchez both claimed that they were in attendance for the entire meeting on February 16, 2015, and that the topics of pay or benefits never came up at all. Tr. 144:17-19; 131:12-16. Sanchez also claimed that Ma never addressed or responded to any rumors.[2] Tr. 145:2-3. Therefore it is clear that Sanchez and Akanbi did not corroborate Ma's testimony about what she said at the meeting in any material respect, and the Hearing Officer's finding is clearly erroneous.

Further, as discussed above, it is totally illogical to conclude, as the Hearing Officer seems to have concluded, that Shirley Ma would testify that she discussed the issue of benefits and pay at the February 16 meeting (by refuting rumors), if she had not in fact raised the issue of pay and

[2] Akanbi also stated that she didn't recall Ma making any statements about rumors. Tr.132:10-12

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benefits at all. Ma would lack incentive to make such a claim in that case. The Hearing Officer erred in concluding that Akanbi and Sanchez' testimony was corroborated by Ma; In fact, given the Ma and Shelby's testimony that the topics of pay and benefits topics were discussed on February 16, Akanbi and Sanchez' testimony was clearly not credible.

EXCEPTION NO. 6 (P. 8) – THE HEARING OFFICER ERRONEOUSLY DETERMINED THAT SHELBY'S ACCOUNT OF WHAT SHE HEARD AT THE MEETING SHOULD NOT BE CREDITED SIMPLY BECAUSE SHE MISSED PART OF THE MEETING:

The Union excepts to the Hearing Officer's erroneous determination that Shelby's account of what she heard at the February 16 meeting should not be credited simply because she did not attend the entire meeting. First, it is disputed whether Ma or someone else first spoke at the meeting.[3] Second, even if Ma did speak first at the meeting, this would not support the conclusion that Shelby's testimony about the words she heard at the meeting is incredible. The Hearing Officer failed to explain—and in fact there is no rational explanation— the assertion that the Hearing Officer "cannot credit her account" of what Shelby heard Ma state at the meeting, merely because the possibility exists that Ma made additional statements prior to Shelby's attendance at the meeting.

EXCEPTION NO. 7 (PP. 4-9) – THE HEARING OFFICER FAILED TO ADDRESS THE EMPLOYER'S UNLAWFUL SOLICITATION OF GRIEVANCES DURING THE MEETING:

The Union excepts to the Hearing Officer's failure to address the employer's unlawful solicitation of grievances during the February 16 meeting. Shelby testified that during the meeting, after Ma invited the employees to ask questions, one of the unit members expressed support for the Union because of the concern that Ma would fire African Americans. In response to this concern, the Assistant Administrator, Debbie Beyelia invited employees at the meeting to come to her for resolution, telling employees that if they "have a problem, that she - - [they] could come to her for whatever [they] have a problem and she would try to resolve it." Tr. 154:1-12; 27:9-11.

[3] The record shows that Akanbi testified that "Michelle" spoke first. Tr. 130:9-10.

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Under similar circumstances the Board upheld an objection to an election. In *The Majestic Star Casino*, during a meeting the employer held prior to the election, the employer invited eligible voters to express their concerns and some mentioned various issues. In response, the employer's director of Human Resources "told them that she was going to look into these things the best she could." *The Majestic Star Casino, LLC*, 335 NLRB 407, 407 (2001). In that case, like this one, the employer had told employees "throughout the campaign that it could not make any promises" and had included "[a] statement to this effect" in some of its campaign literature. *Id.* The Board sustained the finding that this was objectionable conduct because it "constitutes a promise to look into employees' specific grievances." *Id.* at 408.

Beyela's statement at the meeting is clearly an objectionable under *The Majestic Star Casino.*

For the above reasons, these exceptions should be granted and the Hearing Officer's Report on Objections should be reversed.

Dated: July 17, 2015

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By: _____
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EXHIBIT A

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 32

COMPREHENSIVE CARE OF OAKLAND LP d/b/a BAY AREA HEALTHCARE CENTER

Employer

And **Case 32-RD-134177**

CAYETANO SANCHEZ

Petitioner

And

SERVICE EMPLOYEES INTERNATIONAL UNION - UNITED HEALTHCARE WORKERS – WEST (SEIU-UHW)

Involved Party Union

HEARING OFFICER'S REPORT ON OBJECTIONS[1]

Region 32 of the National Labor Relations Board (NLRB or the Board) conducted an election on February 18, 2015[2] (the Election), among certain employees of Comprehensive Care of Oakland LP d/b/a Bay Area Healthcare Center (the Employer). A majority of employees casting ballots in the election voted against representation by the Service Employees International Union – United Healthcare Workers—West (the Union). However, the Union filed 39 separate objections to the election contesting the results of the election claiming that the Employer engaged in objectionable conduct and asking that the election be set aside and that a new election be held. On April 30, the Regional Director for Region 32 issued a Supplemental Decision On Objections and Notice Of Hearing setting Objections 11, 16 through 29, 34, 35, 37, and 38 for hearing.[3]

After conducting a hearing in this matter on May 27, and carefully reviewing the evidence as well as arguments made by the parties, I recommend that the Union's objections be

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[1] References in this Hearing Officer's Report on Objections shall be designated by page and line number as follows: TR. for transcript; BD. Exh. for Board Exhibits; ER Exh. for Employer Exhibits; and U. Exh. for Union Exhibits.

[2] All dates occurred in 2015 unless otherwise noted.

[3] On May 14, the Union filed a Request for Review of the Regional Director's Supplemental Decision on Objections. Specifically, the Union requested review of the Regional Director's decision to dismiss Union Objection No. 39. On May 27, the Board denied the Union's request.

EXHIBIT A

overruled in their entirety as the evidence presented in support of these objections is insufficient to show that the Employer engaged in objectionable conduct. As a threshold matter, on brief the Union requested withdrawal of Objections 11, 16, 17, 18, 23 through 29, 34, 35, 37, and 38.[4] I hereby approve that request. Accordingly, the only Objections remaining before me are Objections 19 through 22, which allege essentially that the Employer promised tangible economic benefits to unit employees as an inducement to vote against the Union. I hereby recommend overruling these objections because the Union presented insufficient evidence at the hearing to support them. In this regard, there was simply insufficient evidence to establish that the Employer promised not to decrease current wages or benefits or to grant additional benefits to induce unit employees to vote against Union representation.

In this report, I will recount the procedural history of this matter, discuss the parties' burdens of proof, and the Board standard for setting aside elections. I will then describe the Employer's operation and give a brief overview of the relevant facts. Finally, I will discuss each objection and my recommendations.

I. PROCEDURAL HISTORY

The Petition in this matter was filed on August 6, 2014. Pursuant to a Decision and Direction of Election that issued on January 20, 2015, a manual ballot election was conducted on February 18 in the following appropriate bargaining unit:

> All full-time and regular part-time Certified Nurse Assistants and Licensed Vocational Nurses employed in the Employer's skilled nursing unit and sub-acute unit, Cooks, Kitchen Helpers, Laundry Workers, Housekeepers, Utility Workers, and Nurse Assistants employed by the Employer at its Oakland, California, facility, excluding registered nurses, office employees, guards and supervisors as defined in the Act.

The ballots were counted on February 18 and a Tally of Ballots was served on the parties. The Tally of Ballots showed the following results:

Approximate number of eligible voters	98
Number of void ballots	1
Number of votes cast for SEIU-UHW	32
Number of votes cast against SEIU-UHW	51
Number of valid votes counted	83

[4] Regarding Objection 37, the Union's brief appears to contain a misstatement. In this regard, in listing the Objections that are being withdrawn, the Union's brief lists Objection 27 twice. It would appear that the second mention of this Objection actually refers to Objection 37. If that is correct, then I am hereby approving the requested withdrawal of Objection 37. Moreover, even if the withdrawal request does not include Objection 37, I recommend that it be overruled anyway, since the Union failed to present any evidence to support it.

Number of challenged ballots.....1
Number of valid votes counted plus challenged ballots.....84

The number of challenged ballots was not sufficient to affect the results of the election. Thus, a majority of the valid ballots were cast against representation by the Union.

After the election, the Union filed timely objections. On April 30, the Regional Director for Region 32 issued a Supplemental Report on Objections and Notice of Hearing recommending disposition of all the objections save for Objection Nos. 11, 16 - 29, 34, 35, 37, and 38 as those objections raised substantial and material issues warranting further investigation. A hearing was set for May 27 to give the parties an opportunity to present evidence regarding those Union Objections. As noted above, after the hearing, on brief, the Union requested withdrawal of all of the Objections except for Objection 19-22.

As the hearing officer designated to conduct the hearing and to recommend to the Board whether Union's Objections 19 through 22 are warranted, I heard testimony and received into evidence relevant documents on May 27. Parties were permitted to file briefs in this matter. The Union and Employer timely filed briefs, which were fully considered by the undersigned in making the following recommendations to the Board.[5]

II. THE BURDEN OF PROOF AND THE BOARD'S STANDARD FOR SETTING ASIDE ELECTIONS

It is well settled that "[r]epresentation elections are not lightly set aside" as there is a strong presumption that ballots cast under specific NLRB protocol reflect employee desires. *Lockheed Martin Skunk Works*, 331 NLRB 852, 854 (2000) (citations omitted). As such, the objecting party carries the burden of proving that there has been misconduct that warrants setting aside the election. *See Consumers Energy Co.*, 337 NLRB 752, 752 (2002). To do so, the objecting party must establish facts raising a "reasonable doubt as to the fairness and validity of the election." *Patient Care of Pennsylvania*, 360 NLRB No. 76 (2014) (citing *Polymers, Inc.*, 174 NLRB 282, 282 (1969), enfd. 414 F.2d 999 (2d Cir. 1969), cert. denied 396 U.S. 1010 (1970)). The objecting party must show, by specific evidence, that there has been prejudice to the election. *See Affiliated Computer Services, Inc.* 355 NLRB 899, 900 (2010) (citing *NLRB v. Mattison Machine Works*, 365 U.S. 123, 123–124 (1961)). Moreover, to meet its burden the objecting party must show that the conduct in question affected employees in the voting unit. *See Avante at Boca Raton*, 323 NLRB 555, 560 (1997) (overruling employer's objection where no evidence that unit employees knew of the alleged coercive incident). Therefore, the burden of proof to set aside a Board-supervised election is a heavy one. *See Delta Brands, Inc.*, 344 NLRB 252, 253, (2005) (citing *Kux Mfg. Co. v. NLRB*, 890 F.2d 804, 808 (6th Cir. 1989)).

In determining whether to set aside an election, the Board applies an objective test: whether the conduct of a party has "the tendency to interfere with employees' freedom of choice." *Cambridge Tool Pearson Education, Inc.*, 316 NLRB 716, 716 (1995). Thus, the issue

[5] Petitioner, who was present at the hearing, did not submit a brief.

is not whether a party's conduct in fact coerced employees, but whether the alleged misconduct reasonably tended to interfere with employees' free and uncoerced choice in the election. *See Baja's Place,* 268 NLRB 868, 868 (1984); *see also Pearson Education, Inc.*, 336 NLRB 979, 983 (2001) (citing *Amalgamated Clothing Workers v. NLRB*, 441 F.2d 1027, 1031 (D.C. Cir. 1970)).

III. THE EMPLOYER'S OPERATION AND THE PARTIES' BARGAINING HISTORY

The Employer is engaged in the business of providing rehabilitation and skilled nursing care out its Oakland, California facility (the Facility). The Employer's current ownership took over operations of the Facility sometime in 2011 when the Employer's unit employees were already represented by the Union. The Union and Employer are parties to an expired collective bargaining agreement, which ran from May 24, 2012 through November 23, 2013. The parties were in the process of bargaining for a successor agreement when Employer Certified Nurse Assistant (CNA) Cayetano Sanchez (Petitioner), an individual, filed the August 6, 2014 petition that led to the election in this case.

IV. THE UNION'S OBJECTIONS AND MY RECOMMENDATIONS

The Order directing hearing in this matter instructs me to resolve the credibility of witnesses testifying at the hearing and to make findings of fact. Unless otherwise specified, my summary of the record evidence is a composite of the testimony of all witnesses, including in particular testimony by witnesses that is consistent with one another, with documentary evidence, or with undisputed evidence, as well as testimony that is uncontested. Credibility resolutions are based on my observations of the testimony and demeanor of witnesses and are more fully discussed within the context of the objection related to the witnesses' testimony. The four objections at issue are:

Objection No. 19: **The Employer, by and through its agents, promised employees that it would not decrease their current wages or benefits if they voted against union representation.**

Objection No. 20: **The Employer, by and through its agents, promised not to decrease current wages or benefits as an inducement to vote against union representation.**

Objections No. 21: **The Employer, by and through its agents, during the critical period promised employees that it would grant additional benefits to employees if they voted against union representation.**

Objections No. 22: The Employer, by and through its agents, made promises of benefits as an inducement to vote against union representation.

As evidenced at the hearing and on brief, these four objections all concern statements allegedly made by the Employer during captive audience meetings held during the critical period. It is undisputed that there were only two such Employer sponsored meetings. The first meeting was on February 12 and was led by Employer hired Labor Consultant Kia Parks. The second meeting was held on February 16, and was led by Employer CEO and Administrator Shirley Ma. Although the Union proffered some testimony at the hearing regarding what occurred during the meeting on February 12, the testimony was uncontroverted that there was no mention of wages or benefits at this February 12th meeting. As such, on brief, the Union has properly limited its argument in support of these four objections to what was purportedly said at the February 16th meeting by the Employer's CEO and Administrator Shirley Ma.

The Union's sole witness at the hearing was Laundry Worker Mary Shelby, a bargaining unit employee with 21 years of service with the Employer and unofficial Union shop steward,[6] who testified at the hearing pursuant to a subpoena. Shelby testified that the second Employer sponsored meeting occurred on February 16. This was a non-mandatory all-staff meeting that lasted from around 3:00 PM to about 4:00 PM in the dining room of the Facility. Shelby initially testified that she attended the entire meeting. However, on cross-examination Shelby conceded that she arrived approximately 30 minutes late to the meeting and thus could not provide a description of what occurred in the first half of the meeting from 3:00 PM to 3:30 PM. According to Shelby, approximately 50 employees attended this meeting, including supervisors, office employees, and bargaining unit employees.

On direct examination, Shelby stated that during the half hour that she was in the meeting, Ma gave a speech to the employees, during which Ma told the group that wages and benefits "and all that" would remain the same and that nothing would change. When pressed further, Shelby testified that Ma stated, "wage, benefit and health plan and all that was gonna stay the same [sic]. Nothing was going to change or nothing." When asked again, Shelby further confirmed that those were Ma's exact words. Shelby testified that Ma then went on to state that "we was gonna get a raise. And she said it was going to be next month in March. And that's when everybody started clapping and stuff." On cross-examination, Shelby noted that Ma did not provide any explanation as to how much she was going to raise wages, no employees asked any questions about the alleged wage increase, and that Shelby did not, in fact, actually receive a wage increase in March.

The Employer called Ma as a witness to rebut Shelby's testimony. On direct examination, Ma testified that she spoke first at the meeting and addressed rumors that the Employer would terminate African Americans and cut employee pay and benefits. Ma explained

[6] Shelby testified that she is an unofficial shop steward with the Union whereby she has assisted the Union in matters involving representation of bargaining unit employees.

that she refuted these "false rumors" and told employees that she could not make any promises. In fact, according to Ma, this was a consistent theme throughout her testimony—she repeatedly testified that, per instructions from the Employer's Labor Consultant Parks, she told employees she could not make any promises and she specifically denied promising that she would give employees a pay increase after the election or otherwise change employee benefits. When confronted with Shelby's testimony, in her direct examination Ma unequivocally denied making such promises, stated that she asked employees to give her a chance, and further explained that employees clapped at the end of each speech.

During the Union's cross-examination, Ma attempted to clarify that if employees were due a wage increase under the collective-bargaining agreement or as a result of the City of Oakland, California raising the statutory minimum wage in March, then employees would have received a wage increase. However, under increasingly aggressive questioning, Ma could not confirm whether any employees actually received a wage increase in March.[7] But then, on re-direct examination, when Ma was asked in light of Shelby's account, whether she promised employees at the February 16 meeting that they would get a raise in March, Ma again replied in the negative.[8]

To buttress Ma's denial that she made any promises to employees during the February 16th meeting, the Employer called Registered Nursing Assistant and former Union shop steward

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[7] As the counsel for the Union's questions became increasingly aggressive, Ma admitted to having a post-election conversation with employees Carol Fry and Regina Richardson in late February (i.e. outside of the critical period). Ma testified that the employees were upset about the outcome of the election and they told Ma that they had not received a wage increase in a long time. According to Ma, "And then I said, you know, which there was a Union, I said, I can't make any promises. You know, we can look at that." When asked by Union counsel what else she told them, Ma replied, "I told them, I said we technically are still Union. . . . I said we have to continue the deduction on Union dues because they don't want to pay Union dues and we have to continue to deduct Union dues . . . . I say we have to wait and see what happen." Ma went on to testify on cross-examination that she told these two employees, "right now, I said there's nothing to do. I cannot make any promises. I can't make any changes. But understand they're -- I mean it's important for them to know that I do care about them, which I do. And that I understand their concerns." Although this testimony concerns events outside of the critical period, it is arguably relevant for credibility purposes as it established that Ma's understanding regarding her not being able to make any promises to employees has remained consistent even after the election.

[8] There was additional testimony adduced from Ma on cross-examination about the subject of whether any employees were, in fact, granted a wage increase in March. Thus, the Union elicited testimony from Ma that some employees may have received a wage increase in March based on their seniority per the contractual wage scale and that a raise may have been given to some employees in March in connection with the increase in the minimum wage mandated by the City of Oakland. However, this testimony is legally irrelevant. The issue before me is whether Ma said anything at the February 16th meeting (during the critical period) regarding whether employees would get a wage increase in March, not whether or not any employees did, in fact, get such an increase in March after the critical period was over. It is well-established that the period during which the Board will consider conduct as objectionable extends only from the date of the filing of the petition to the date of the election. *See, e.g., Ideal Electric Mfg. Co.*, 134 NLRB 1275 (1961). Accordingly, I find that this portion of Ma's testimony is relevant only to my making credibility determinations concerning whether Ma made this alleged promise at the February 16th meeting (as testified to by Shelby) and that whether or not an actual wage increase occurred is otherwise legally irrelevant.

Funmi Akanbi and Petitioner Cayetano Sanchez as witnesses. According to all the witnesses, a number of employees and supervisors/managers spoke at this meeting; however, the order varied based on the testimony. According to Ma, Akanbi, and Sanchez, Ma spoke first and last at the meeting. Ma, Sanchez, and Akanbi each testified that Certified Nursing Assistant Amanda Tarpeh spoke immediately after Ma. By contrast, Shelby testified that when she arrived at the meeting (30 minutes late), Tarpeh was speaking and that Ma spoke after Tarpeh. In any event, Akanbi testified that during the February 16th meeting, she only recalled Ma asking employees to give her a chance. But she denied that there was any discussion of pay or benefits during the meeting. Moreover, she specifically denied that there was any discussion during the meeting about a pay increase in March. Similarly, Sanchez testified that Ma spoke first during the meeting and that Ma merely asked employees to give her a chance.[9] When specifically asked whether Ma discussed pay or benefits, made any promises to increase wages or benefits, or made any promises at all, Sanchez replied in the negative.

Board Law Governing Promises Of Tangible Economic Benefits

It is well established that a promise of benefits, like an actual conferral of benefits, which is made in response to an organizing campaign or in anticipation of a representation election, violates the Act because "[e]mployees are not likely to miss the inference that the source of benefits now conferred [or promised] is also the source from which benefits must flow and which may dry up if it is not obliged." *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 409-410 (1964); *see also American Geri-Care, Inc.* 258 NLRB 1116, 1122 (1981) (the Board adopted the administrative law judge's decision, which cited to *Exchange Parts Co.*, and set aside the election based on the employer's pre-election promise of benefits). Because of the coercive nature inherent in such a well-timed increase in benefits, the Supreme Court has likened such an act to "a fist inside [a] velvet glove," *NLRB v. Exchange Parts Co.*, 375 U.S. at 409. As such, promises of benefits, either implied or actual, are grounds for setting aside an election and directing a new election. *See Etna Equipment & Supply Co,. Inc.*, 243 NLRB 596, 596 (1979). On the other hand, merely advising employees that their current wages and benefits will stay the same regardless of the election results is not objectionable conduct. In this regard, in *Crown Electrical Contracting, Inc.,* 338 NLRB 336 (2002), the Board held that an employer's statement to employees that he would do everything he could to keep employees' current benefits was nothing more than a lawful promise to maintain the status quo, and that there was no context or history that would cause employees to interpret the statement as an objectionable promise to increase benefits. See also, *Weather Shield Mfg.,* 292 NLRB 1, 2 (1988), revd. on other grounds, 890 F.2d 52 (7th Cir. 1989); *El Cid, Inc.,* 222 NLRB 1315, 1316 (1976); and *Ernst Home Centers, Inc.,* 308 NLRB 848 (1992).

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[9] Consistently with Ma, Sanchez also testified that directly after Ma spoke, there was a speech from Tarpeh. The subsequent speakers at the meeting included (in various orders depending on the witness), Assistant Administrator Debbie Beyelia, Dietary Supervisor Queenie Guan, Activities Director Marie Martinez, and Tony Arganas. According to Sanchez, Ma spoke again to close the meeting. However, her closing remarks were limited to thanking employees for the nice things they said about her. Sanchez specifically denied that Ma said anything in her closing remarks about wages or benefits or that she made any promises during those remarks.

Recommendation For Objection Nos. 19 through 22

As noted above, in support of Objection Nos. 19 through 22, based largely on the testimony of Shelby, the Union alleges that during the critical period Administrator Ma advised employees at the February 16th meeting that it would not decrease wages or benefits, and that the Employer promised additional benefits (such as a wage increase, gift cards, and parties), respectively, if employees voted against Union representation. Contrary to allegations raised in these objections, I find that the Union did not meet its burden of persuasion and I recommend overruling Union Objection Nos. 19 – 22 in their entirety

Given the contradictory nature of the witnesses' testimony regarding the alleged promise of benefits, I must make a determination as to which account is more likely under the totality of the circumstances while weighing the witnesses' credibility. I found Ma's testimony to be incredible. Ma appeared to be coached as she repeatedly testified that she told employees that she could not make any promises. Moreover, when counsel for the Union aggressively asked whether the Employer enacted a wage increase, Ma became evasive, shifted in her seat, and was visibly sweating. Specifically, when asked if the employer enacted a wage increase in March, Ma testified that if an employee was due a wage increase under the contract then they would have received one. When pushed as to whether employees actually received a wage increase in March, Ma testified, "I cannot say exactly right now." As the Union's line of questioning went on with increasing fervor, Ma's tone became increasing combative, with sweat appearing on her brow and above her lip, and at one point Ma questioned the relevancy of the Union's line of questioning. To that end, as noted by counsel for the Union, Ma continually looked at her own counsel during the Union's cross-examination.

I do not credit the testimony of Shelby either. Shelby appeared extraordinarily nervous during both her direct and cross-examination testimony as her lip quivered, she appeared to visibly shake, and her voice trailed off and was inaudible at times. The fact that Shelby testified to alleged unlawful behavior by Ma while sitting less than 10 feet from Ma—the Employer official who ultimately controls the fate of her employment—is not lost on me. But, I further found her actual recollection of events to lack credibility. For instance, it does not make sense that Ma would tell employees that their wages and benefits will remain the same in one breath and then promise employees a wage increase in the next breath. Furthermore, Shelby testified that when she entered the February 16 meeting Tarpeh was speaking; however, she also claims to have heard Ma speak and make certain promises. According to Ma, Akanbi, and Sanchez, Ma primarily spoke first—when Shelby was admittedly absent—and then Ma made a brief remark at the end of the meeting. To that end, Shelby conceded that she missed the first 30 minutes of the meeting. Therefore, I cannot credit her account of the events in question on February 16.

In contrast, Akanbi and Sanchez largely corroborated one another and Ma's testimony. Both Akanbi and Sanchez appeared honest and forthright in their answers, did not pause to answer questions, and made direct eye contact with the questioning party. The tones of both of their voices remained calm and each witness answered the questions presented. While Sanchez,

as the Petitioner of this matter, can be considered an interested party, Akanbi is a rank and file employee, former shop steward, current member of the bargaining unit, and presumptively a neutral witness. As such her testimony carries a great deal of weight.

Given the corroborative nature of Akanbi and Sanchez' testimony, when taking into account that Shelby admittedly missed approximately one-third to one half of the meeting while Akanbi and Sanchez attended the February 16 meeting in its entirety, I credit the testimony of Akanbi and Sanchez that the Employer did not make any promises of benefits during the February 16th meeting.

Finally, there was some testimony regarding the Employer giving employees gift cards and the Employer offering parties. This testimony was elicited during the cross-examination of Ma. As a threshold matter, it is arguable whether this evidence even falls within the scope of Objections 19 through 22, as these objections appear to center only on remarks made by Ma during the February 16th meeting. In any event, even if I were to consider this evidence, as regards the allegations involving gift cards, the testimony lacked specificity as to whether bargaining unit employees received gift cards, when the gift cards were given, and their amount. By contrast, Ma's unrebutted testimony established that the Employer has given gift cards as a safety incentive since sometime in 2011. Given the lack of testimony to rebut this past practice, I do not find the Employer's past practice of giving gift cards as a safety incentive, which occurred before and during the critical period, to be objectionable conduct. Similarly, regarding the alleged parties, there was no testimony to indicate that the Employer promised new parties as an inducement to vote against Union representation. Rather, the only testimony on the subject indicated that the Employer has held a yearly Christmas party for unit and non-unit employees alike every year since 2012. There was no other evidence indicating that the Employer either partook in, or sponsored, any other parties. Given the lack of evidence, I further do not find the Employer's past practice of holiday parties, which predates the critical period, to be objectionable conduct.

Under these circumstances, as the objecting party, the Union failed its burden of establishing that the Employer promised employees that their wages and benefits would increase or that the Employer promised employees other tangible benefits if they voted to decertify the Union.

V. CONCLUSION

Based on all of the above, I recommend that the Union's objections be overruled in their entirety. The Union has not met its burden of proof and has failed to establish that the Employer engaged in any conduct that reasonably tended to interfere with employee free choice during the critical period leading up to the February 18 election. Therefore, I recommend that an appropriate certification of results issue.

VI. EXCEPTIONS

A. Right To File Exceptions

Pursuant to the provisions of Section 102.69 of the National Labor Relations Board's Rules and Regulations, Series 8, as amended, you may file exceptions to this Report with the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, DC 20570-0001.

B. Procedures for Filing Exceptions

Pursuant to the Board's Rules and Regulations, Sections 102.111 – 102.114, concerning the Service and Filing of Papers, exceptions must be received by the Executive Secretary of the Board in Washington, D.C. by close of business on **July 17, 2015 at 5 p.m. (ET)**, unless filed electronically. **Consistent with the Agency's E-Government initiative, parties are encouraged to file exceptions electronically.** If exceptions are filed electronically, the exceptions will be considered timely if the transmission of the entire document through the Agency's website is **accomplished by no later than 11:59 p.m. Eastern Time** on the due date. Please be advised that Section 102.114 of the Board's Rules and Regulations precludes acceptance of exceptions filed by facsimile transmission. Upon good cause shown, the Board may grant special permission for a longer period within which to file. A request for extension of time, which may also be filed electronically, should be submitted to the Board and a copy of such request for extension of time should be provided to the Regional Director and to each of the other parties to this proceeding. A request for an extension of time must include a statement that a copy has been served on each of the other parties in the proceeding in the same manner or a faster manner as that utilized in filing the request with the Board.

A copy of the exceptions must be served on each of the other parties to the proceeding, as well as on the Regional Director, in accordance with the requirements of the Board's Rules and Regulations.

Filing exceptions electronically may be accomplished by using the E-filing system on the Agency's website at www.nlrb.gov. Once the website is accessed, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions. The responsibility for the receipt of the exceptions rests exclusively with the sender. A failure to timely file the exceptions will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off line or unavailable for some other reason, absent a determination of technical failure of the site, with notice of such posted on the website.

Comprehensive Care of Oakland LP d/b/a
Bay Area Healthcare Center
Case 32-RD-134177

Dated at Oakland, California: July 6, 2015

Noah Garber
Hearing Officer
National Labor Relations Board, Region 32
1301 Clay Street, Suite 300 N
Oakland, CA 94612-5224

PROOF OF SERVICE

I am a citizen of the United States and an employee in the County of Alameda, State of California. I am over the age of eighteen years and not a party to the within action; my business address is 1001 Marina Village Parkway, Suite 200, Alameda, California 94501-1091. On July 17, 2015, served upon the following parties in this action:

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EXCEPTIONS AND BRIEF IN SUPPORT OF EXCEPTIONS TO HEARING OFFICER'S REPORT ON OBJECTIONS

☑ (BY U.S. MAIL) I am personally and readily familiar with the business practice of Weinberg, Roger & Rosenfeld for collection and processing of correspondence for mailing with the United States Parcel Service, and I caused such envelope(s) with postage thereon fully prepaid to be placed in the United States Postal Service at Alameda, California.

☑ (BY ELECTRONIC SERVICE) By electronically mailing a true and correct copy through Weinberg, Roger & Rosenfeld's electronic mail system to the email addresses set forth below.

I certify under penalty of perjury that the above is true and correct. Executed at Alameda, California, on July 17, 2015.

Rhonda Fortier-Bourne

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